Supreme Court, U.S.
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No. 02-280

In The Supreme Court of the United States

WALTER ROSALES; MARIE TOGGERY; KAREN TOGGERY,

Petitioners,

v.

KEAN ARGOVITZ RESORTS, INC., a limited liability company; LAKES GAMING, INC., a publicly traded company; KEAN-ARGOVITZ RESORT-JAMUL, LLC, a Nevada limited liability company; LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION AND SUPPLEMENTAL APPENDIX

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QUESTIONS PRESENTED

1. Where a district court dismisses a second complaint on two alternative grounds: failure to plead a civil rights claim as required by the federal rules of civil procedure and, independently, failure to plead a claim as required by the court's earlier order, and the court of appeals affirms, is any civil rights issue properly before this Court?

2. Where a request to amend pleadings is not made by motion in the district court and is not raised as an issue in the Petitioners' opening brief in the court of appeals, does the issue survive to permit this Court to review it by certiorari?

CORPORATE DISCLOSURE STATEMENT

1. Lakes Gaming, Inc., is a publicly-traded company. No publicly-held companies own ten percent or more of its stock.

2. Kean Argovitz Resorts, Inc., has no parent corporations and no publicly-held companies own ten percent or more of its stock.

3. Kean Argovitz Resorts–Jamul, LLC, has no parent corporations and no publicly-held companies own ten percent or more of its stock.

4. Lakes Kean Argovitz Resorts–California, L.L.C., is owned by two parent corporations: Lakes Jamul, Inc., and Kean Argovitz Resorts–Jamul, L.L.C.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals Ninth Circuit is not reported and is designated as not for publication. The opinion of the United States District Court for the Southern District of California dated April 18, 2001, is also not reported. It is included in the Appendix at 3a. An earlier decision of the trial court dismissing the Petitioners' First Amended Complaint, dated February 1, 2001, is not reported and is included in the Supplemental Appendix at 1sa.

STATEMENT OF THE CASE

This case arises from contract negotiations between a gaming management contractor and a federally-recognized American Indian tribe. The tribe wishes to develop and operate a casino on tribal lands, and entered an agreement with the contractor to develop and manage the planned facility. The negotiations and resulting contract are subject to close regulation by the federal government. In fact, the contract is currently being reviewed by a federal agency, pursuant to congressionally-mandated regulations specifically intended to protect tribes. It will not take effect if the agency finds that the contractor acted improperly.

This case does not present the issue which Petitioners would have the Court reach. The district court dismissed Petitioners' Second Amended Complaint on two alternative grounds, only one of which presents Petitioners' issue concerning "conspiracy," and the Ninth Circuit affirmed

the dismissal on both bases. Neither court held that a private conspiracy is not an actionable claim under 42 U.S.C. § 1985(3); they simply held that the Petitioners had not stated such a claim.

The Parties

Petitioners are three tribe members who oppose gaming development. They attempted to assert civil rights claims against the Respondents, who contracted with the tribe to provide gaming management services. Petitioners cast this commercial dispute as civil rights claims, although they essentially allege only that the contractor acted improperly while negotiating the contract.

Petitioners live in or near the Jamul Indian Village and purport to be enrolled tribe members. ER at 75, ¶ 1.[1] They have been involved in a number of proceedings involving Jamul, having found themselves on the losing side of a number of intra-tribal disputes.[2] For instance, the Petitioners dispute the legitimacy of the current tribal leadership, asserting that Petitioner Rosales was elected Tribal Chairman in 1995, 1997, and 1999. There are currently proceedings pending before the Board of Indian

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[1] For convenience, citations to the Excerpt of Record filed in the Ninth Circuit are included as "ER at __" and to the Supplemental Excerpt of Record as "SER at __."

[2] At least two of the Rosales Claimants, represented by the same counsel, have filed the following federal cases involving Jamul's internal politics: *Jamul Indian Village v. Hunter*, Case No. 95 CV 0131R (S.D. Cal.); *Rosales v. Townsend*, Case No. 97-CV-0769 (S.D. Cal.); and *Rosales v. United States*, Case No. 98-860-L (S.D. Cal.). ER at 154.

Tribal Appeals that are expected to resolve this issue. Petitioners also disagree with Jamul's decision to develop a casino. They disapprove of gambling, considering it "a greed driven, predatory vice," and believe that the planned development will disrupt their homes. *Id.* at 5.

Respondents are related entities fairly described as "engaging in casino management," in the words of the trial court. App. at 14a, n.2. Respondent Lakes Kean Argovitz Resorts–California, L.L.C. ("Lakes KAR") contracted with Jamul Indian Village ("Jamul") to develop and manage a casino gambling facility on tribal land (the "Jamul Contract"). *See* SER at 59-107. The signatories on behalf of Jamul were the tribal Chairman, a Vice-Chairman, three members of the Executive Council, and the Secretary/Treasurer. SER at 105.

The Claims

Petitioners asserted novel claims in an attempt to involve the federal courts in an internal tribal dispute that does not implicate civil rights law, and that is currently being resolved in other forums, consistent with Congressional intent. Petitioners had three chances to serve and file a complaint that stated a civil rights claim, but they never did. They appealed the district court's dismissal of their third, insufficient effort.

The Jamul Contract

Intending to become involved in gaming to generate revenue for the tribe, the Jamul Indian Village ("Jamul")

entered into a Compact with the State of California in October 1999 (the "Compact"). SER at 108-68.[3] The Secretary of the Interior approved the Compact in May 2000. *Notice*, 65 Fed. Reg. 31,189 (May 16, 2000).

The core terms of the Jamul Contract are divided into "Development Provisions" and "Management Provisions," which involve, respectively, the development of a gaming facility and its subsequent operation. The Management Provisions will not take effect until approved by the National Indian Gaming Commission ("NIGC") Chairman. SER at 85. The Development Provisions allow Jamul to begin preparing for the development, while recognizing that the NIGC may not approve the Management Provisions. For example, pursuant to the Development Provisions, Lakes KAR is paying Jamul pre-construction advances of $40,000 per month pending approval. SER at 71. These advances are to be repaid pursuant to a Promissory Note agreed to by the parties. *Id.*

The First Two Complaints and Their Dismissal

In an attempt to stop gaming development, Petitioners filed this action against each of the Respondents, although only one of these entities, Lakes KAR, is a party to the Jamul Contract.

The underlying appeal challenged the dismissal of the Second Amended Complaint, which was filed in February

[3] The Compact was filed below as Exhibit A to the Notice of Lodgement and Request for Judicial Notice in Opposition to Defendants' Motion to Dismiss the First Amended Complaint. *See* ER at 7.

2001. That complaint represented Petitioners' third unsuccessful attempt to state a claim sufficient to survive a dismissal motion. The first Complaint was filed in September 2000. It named two corporate defendants (Respondents Kean Argovitz Resorts, Inc. and Lakes Gaming, Inc.), and two individual defendants. It asserted three state law tort claims and violations of three federal civil rights statutes, based on allegations that the defendants had purportedly violated the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (1994 & Supp. 1999) and the Compact during the Jamul Contract negotiations. SER at 5-16. It also sought declaratory and injunctive relief. *Id.* at 16-18.

The individual defendants sought dismissal on personal jurisdiction grounds, and the corporate defendants, joined by the individuals, filed a motion arguing that the action was preempted by IGRA, that Jamul was an indispensable party, and that the Complaint failed to assert facts sufficient to support the asserted civil rights claims. ER at 4. Before the district court could consider the dismissal motions, Petitioners rendered them moot by filing a First Amended Complaint. ER at 35-62. The First Amended Complaint dropped the two individual defendants and added two corporate defendants, resulting in the composition of parties involved in this appeal; it did not change the legal claims asserted in the First Amended Complaint.

Respondents moved to dismiss the First Amended Complaint on essentially the same grounds asserted against the initial Complaint, *i.e.*, that the action was preempted by IGRA, that the factual allegations did not support the alleged federal civil rights violations, and that

the entire action should be dismissed because Jamul was an indispensable party.

While electing not to dismiss the case on indispensable party grounds, the district court dismissed the state law tort claims as a matter of law, because they were based on alleged violations of IGRA and the Compact, neither of which afforded Petitioners a private right of action. Supp. App. at 4sa-8sa. The court also found that the state law tort claims were preempted by IGRA, because that statute vested authority in the NIGC – not in Petitioners – to oversee Indian gaming. *Id.* For these reasons, the court dismissed the state law tort claims with prejudice and without leave to amend. *Id.* at 14sa.

Having dismissed the state law tort claims, the district court concluded that it was "ill-equipped to properly examine" the federal civil rights claims, because they were based on factual allegations that supported the claims that had been dismissed. *Id.* The court therefore dismissed the federal civil rights claims without prejudice and with leave to amend. *Id.* Consistent with federal law, the court instructed the Petitioners that if they chose to assert federal civil rights claims in the future they "must plead ***specific facts*** regarding each Defendants' discriminatory conduct as to each individual Plaintiff." *Id.* at 13sa. (emphasis in original).

The Second Amended Complaint and Its Dismissal

Petitioners filed their Second Amended Complaint on February 28, 2001. Surprisingly, Petitioners included not only the federal civil rights claims the court had invited them to amend, but also the very same state law tort claims that had already been dismissed ***with prejudice***

and ***without leave*** to amend. *Id.* The factual allegations are substantially the same, except that almost every express reference to IGRA and the Compact was deleted, presumably to avoid the pitfalls of preemption that had defeated the claims in the First Amended Complaint.

The federal civil rights claims, which were the subject of the appeal to the Ninth Circuit were: an equal protection claim asserted under 42 U.S.C. § 1981, a property rights claim under 42 U.S.C. § 1982, and a claim of conspiracy to violate civil rights under 42 U.S.C. § 1985(3). The dismissal of the first two claims is not raised in the Petition for Certiorari.

In general, the Petitioners rested on broad, conclusory allegations. ¶¶ 22 & 34, App. at 28a, 34a. The Second Amended Complaint asserts that the conduct alleged in these paragraphs violates 25 U.S.C. §§ 1981, 1982, and 1985(3). *See* ¶¶ 60, 68 & 74, App. at 40a, 42a & 44a. Only the claim under section 1985(3) remains.

In addition, the twice-amended pleading asserts that "overt acts" in violation of these statutes "have been coupled with disparaging racial remarks concerning the Plaintiffs' respective degrees of Indian blood, including but not limited to referring to them as 'half blood Indians,' 'a half blood community,' and seeking to have them wrongfully evicted from their homes, and denied their possessory rights to their federal benefits." *Id.* The pleading does not allege, however, that any of the Respondents ever made any of the purportedly disparaging racial remarks. ¶¶ 20 & 33, *Id.* at 27-28a & 33-34a.

In addition, although the claim had been made earlier, the Second Amended Complaint does not contain allegations that the Respondents violated either IGRA or the

Compact. In fact, to avoid the district court's earlier conclusion that they can bring no private cause of action under IGRA or the Compact, the Petitioners simply deleted almost all such references from the Second Amended Complaint. They attempted to distance their case from Indian gaming, stating, "At its 'core' the Second Amended Complaint pleads seven causes of action that have nothing to do with the Defendants' attempts to build a casino in Jamul." ER at 155; *see generally id.* at 145-69.

The Fate of the State Law Tort Claims

Respondents moved to dismiss the Second Amended Complaint in its entirety. They argued, that the state law tort claims had already been dismissed with prejudice and without leave to amend. After receiving the motion and before the court could consider it, Petitioners withdrew the state law tort claims. App. at 11a. They then requested in their opposition papers, but never filed a motion for, leave to amend to re-assert the claims. *Id.*[4] Petitioners appear to ask this Court to review the amendment issue, although it was not properly raised in the district court nor preserved in the court of appeals. Pet. for Certiorari at 21 & n.9.

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[4] In the Rosales Claimants' other litigation involving Jamul, similar tactics caused the district court to issue an order to show cause why sanctions should not be imposed. ER at 134-36. After filing one action in the Southern District of California and facing a motion to dismiss, they voluntarily withdrew the case and filed an identical action in the Central District. *Id.* After the defendants filed a motion to dismiss the later-filed action, they again voluntarily dismissed the case. *Id.* The court ultimately declined to order sanctions, but issued a stern warning against such "procedural tactics and maneuvering." ER at 142.

In response, the district court noted that Petitioners' attempt to recast their case as one that was not integrally connected to Indian gaming was "not well taken." ER at 202. The court remarked that the deletion of references to IGRA and the Compact was "particularly surprising," since such violations had been alleged in both of their earlier complaints. *Id.* at 203. Recognizing that the state law tort claims were the same as those that had already been dismissed with prejudice and without leave to amend, and noting that Petitioners had already amended their complaint twice, the district court denied the motion to amend. *Id.* at 13a.

Dismissal of the Federal Civil Rights Claims

The motion to dismiss the federal civil rights claims was based primarily on two arguments, the second of which itself comprised two arguments: First, that the claims failed because they were preempted by IGRA, despite the deletion of almost all references to the statute; and, second, that the allegations did not meet the standard of specificity required by federal civil rights law or, alternatively, that the allegations did not comply with the district court's prior order. ER at 113. The district court agreed in all respects. App. at 13a.

In its memorandum, the district court reviewed the elements of each civil rights claim, as well as the pleading requirements, and concluded that to avoid dismissal Petitioners had to allege facts sufficient to support a "plausible inference of racially discriminatory intent." App. at 7a. The court concluded that Petitioners had not satisfied this standard because their allegations did "not support an inference of intentional racial discrimination,"

id. at 7a, and did not provide a causal link between Respondents' alleged acts and any intentional discrimination. *Id.* at 9a. As independent grounds for dismissal, the court found that Petitioners had failed to comply with the February 2001 Order that explicitly required them to "plead specific facts" if they sought to reassert their civil rights claims. App. at 10a-11a, quoting prior order, Supp. App. at 13sa. The court described the allegations as "at most, vague and ambiguous," and noted that they did not attribute racist remarks to any of the Respondents. App. at 10a.

The Ninth Circuit Appeal

On appeal to the Ninth Circuit, Petitioners challenged only the dismissal of the federal civil rights claims. By decision dated May 21, 2002, the court entered a unanimous Memorandum Decision. App. at 1a. The court designated its opinion as "not appropriate for publication" and held that it may not be cited as authority.

REASONS THE WRIT SHOULD NOT BE GRANTED

I. THIS CASE DOES NOT PROVIDE A VEHICLE TO EXAMINE THE ISSUE PETITIONERS SEEK TO ARGUE.

A. The Trial Court Decided the Case on Alternative Grounds.

The trial court dismissed the second amended complaint for two – or really, three[5] – separate reasons, only one of which would arguably relate to the issue Petitioners would have this Court reach.

First, the alternative bases for dismissal of the federal claims relate to how Petitioners pleaded, or failed to plead, their claims. The federal constitutional claims were dismissed for two interrelated reasons: They failed to state a claim and were dismissed under Fed. R. Civ. P. 12(b)(6) and they failed to state a claim under the requirements imposed by the trial court's earlier order.

When the district court dismissed the First Amended Complaint, it expressly allowed Petitioners to try yet again to state a claim. It dismissed the federal claims "without prejudice and with leave to amend." Supp. App. at 14sa. The court provided express guidance on what was necessary for any amended complaint:

> If Plaintiffs elect to file a Second Amended Complaint alleging civil rights violations under

[5] The state-law claims were dismissed on the grounds they are preempted by federal law. Supp. App. at 9sa-12sa. This issue was not apparently raised in the Petition, although in the conclusion Petitioners appear to seek to have them reinstated. Pet. at 21 & n.9.

> §§ 1981, 1982 and 1985, Plaintiffs must plead *specific facts* regarding each Defendants' discriminatory conduct as to each individual Plaintiff. Because Plaintiffs' proposed civil rights claims all independently arise from rights secured by the Constitution, Plaintiffs may not rely on or otherwise refer to IGRA or the Tribal-State Compact to establish the prima facie elements of their proposed civil rights claims.

Id. at 14sa (emphasis in original). The Second Amended Complaint was dismissed for its failure to state a claim under this requirement.

B. The Decision Does Not Decide the Issue Stated in the Petition for Certiorari.

Even if the district and circuit courts had decided this case solely on the basis of the third issue in I.A, there would still be no basis for this Court to reach the issue raised by Petitioner. The "conflict in the circuits" urged by Petitioners relates to whether a cause of action exists for conspiracy to deprive a citizen of the right to vote. Pet. for Certiorari at 9.

This Court has decided the only legal issue raised by the stated issue. In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Court articulated what is required to state a claim against a private conspiracy under 42 U.S.C. § 1985(3). The trial court here applied a standard consistent with that articulated in *Griffin*, citing the applicable Ninth Circuit precedent, App. at 7a, *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130 (9th Cir. 2000) (Aldisert, J.), which in turn cites and affirms the district court's application of *Griffin*.

The only thing actually decided here was that, despite being allowed repeated tries to plead a claim that complied with the requirements of *Griffin*, Petitioners never did so. As dictated by the facts – facts which the district court judge had repeated opportunity to come to know – the gravamen of Petitioners' complaints have always been a disagreement with casino gambling at the Jamul Indian Village. This economic dispute simply doesn't become an actionable civil rights complaint merely by adding talismanic conclusory language. Allegations that "statements were made," without alleging that it was the Respondents who made them, are similarly insufficient as a matter of fact. Although only notice of the claim is required under the rules, the trial court correctly determined that the complaint here did not state any basis to infer that any actions of anyone, let alone the Respondents, were motivated by any animus based on race or other class-status. App. at 7a.

Grounded only in the facts as pleaded by Petitioners in this case, and not the lofty legal issue Petitioners would have this Court address, the decisions here simply do not present any substantive issue, let alone one this Court needs to visit again, on the question stated in the Petition.

C. The Unpublished Opinion of the Lower Courts Does Not Contribute to Any Split in the Circuits.

Both the district court decision and the Ninth Circuit Memorandum affirming it are unpublished opinions, and the Ninth Circuit opinion is, by its terms and rule of court, not appropriate for citation to that court or any other courts. If any one-paragraph decision can contribute to a conflict in the circuits justifying the rare action of certiorari review by

this Court, certainly an unpublished one is unlikely ever to be important enough to warrant review. This decision is not.

II. THE ISSUES RELATING TO AMENDMENT OF PLEADINGS HAVE BEEN WAIVED.

Petitioners include in their Petition a request for review of a decision denying them leave to amend for a third time. Pet. at 21 & n.9. Any issue relating to amendment of their pleadings has been waived.

No motion to amend was filed in the district court. In fact, they expressly withdrew their state-court claims. App. at 11a. Then, only in a responsive brief, Respondents merely asked the district court for leave to amend to re-assert their state law tort claims, which had been dismissed. The federal civil rights claims were not part of this request. Indeed, the district court's express intent in inviting a second amended complaint was to permit Petitioners to re-plead their civil rights claims after the dismissal of the state law tort claims in the First Amended Complaint. Supp. App. at 13sa. There had been no developments since that amendment that would have justified a request for another amendment.

Moreover, Petitioners did not raise and brief the issue in the court of appeals; rather, in a footnote they merely claimed that they had asked the district court for leave to amend their federal civil rights claims. The district court decision to deny leave to amend refers only to state law claims. App. at 13a. Appellate courts regularly hold that failure to raise an issue and cite authority in the opening brief on appeal constitutes waiver of the issue. *See, e.g., DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher*

Corp., 14 F.3d 1163, 1168 (7th Cir. 1994) (argument stated in one sentence in the opening brief waived); *Welsh v. Derwinski*, 14 F.3d 85, 86 n.5 (1st Cir. 1994) (issues adverted to in a perfunctory manner and without developed argumentation are deemed waived on appeal). The Ninth Circuit did not err in applying this time-honored rule, especially where its own precedent dictates this result. *See, e.g., Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 993 F.2d 676, 678 (9th Cir. 1993). This Court cannot provide the relief requested by Petitioners without addressing this issue. This case presents an anemic record upon which to consider any change in this aspect of appellate procedure, even if it were properly raised, and it was not raised properly here.

CONCLUSION

For the foregoing reasons, Respondents submit the writ of certiorari should not issue.

Respectfully submitted,

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CONTENTS OF SUPPLEMENTAL APPENDIX

Appendix A
(Memorandum Opinion and Order Regarding First Amended Complaint dated February 1, 2001) 1sa

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WALTER ROSALES, MARIE TOGGERY, and KAREN TOGGERY, Plaintiffs, v. KEAN ARGOVITZ RESORTS, LAKES GAMING, INC., KEAN-ARGOVITZ RESORTS-JAMUL, LC, LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LC, and DOES 1-20, Defendants	Case No. 00-CV-1910 W (POR) **MEMORANDUM OPINION AND ORDER REGARDING FIRST AMENDED COMPLAINT**

Before the Court is Defendants' motion to dismiss for failure to state a claim and failure to join an indispensable party under rules 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure. Plaintiffs Walter Rosales, Marie Toggery and Karen Toggery collectively oppose. All parties are represented by counsel. The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d.1).

I. BACKGROUND

On October 17, 1988 Congress enacted the Indian Gaming Regulatory Act ("IGRA") which, among other things, allows federally recognized Native American tribes to establish casino gaming to promote tribal economic

development and self-sufficiency. *See* 25 U.S.C. §§ 2701 et seq. IGRA requires all Native American tribes intending to pursue Class III[1] casino gaming to negotiate a Tribal-State compact ("Compact") with the state in which the tribal lands are located. *See Id.* The Secretary of the United States Department of the Interior must also approve the Compact. *Id.*

The Jamul Indian Village ("Village"), a federally recognized Native American tribe, is seeking to establish Class III casino gaming on Jamul land. On October 8, 1999 the Village executed a Tribal-State compact with the State of California. On May 2, 2000 he Secretary of the Department of the Interior approved the Compact.

In February 2000, before the Compact was signed by the Secretary, the Village executed a management contract with Defendant Lakes Kean-Argovitz Resorts-California, LLC[2], to manage Village gaming operations. (*See Defs.' Mem. of P. & A.* at 2.) The National Indian Gaming Commission ("NIGC") is currently reviewing the contract for final approval. (*See Id.*) Absent such approval, the project cannot go forward. (*See Id.*)

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[1] Class III gaming is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. §2703(8). Generally, Class I gaming is typically identified as social games solely for prizes of minimal value. *See* 25 U.S.C. §2703(6). Class II gaming usually means the game of chance commonly known as bingo. *See* 25 U.S.C. §2703(7)(A).

[2] For purposes of this motion only, the Court will collectively refer to defendants Kean-Argovitz Resorts, Lake Gaming, Inc., Kean-Argovitz Resorts-Jamul, LLC, and Lakes Kean-Argovitz Resorts-California, LLC as "Defendants." The Defendants primarily engage in casino management.

Plaintiffs Walter Rosales, Marie Toggery and Karen Toggery ("Plaintiffs") are Village members and residents. Plaintiffs' First Amended Complaint ("FAC") alleges seven claims for relief based on Defendants' association and contracts with the Village. Specifically, Plaintiffs allege: (1) interference with contractual and economic advantage; (2) fraud; (3) negligent misrepresentation; (4-6) civil rights violations per 42 U.S.C. §§ 1981, 1982 and 1985; and (7) seek declaratory relief. On December 19, 2000 Defendants responded with a motion to dismiss for failure to state a claim and failure to join an indispensable party.

II. LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of the complaint. *See North Star Int'l v. Arizona Corp. Comm'n,* 720 F.2d 578, 581 (9th Cir.) 1983). Dismissal of a claim under this Rule is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

Under Rule 12(b)(6), a court may dismiss a complaint in three instances. First, dismissal is warranted where the complaint lacks a cognizable legal theory. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984); *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827, 1832, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."). Second, a complaint may be dismissed where it presents a cognizable legal theory yet fails to

plead essential facts under that theory. *See Robertson*, 749 F.2d at 533. Third, dismissal is appropriate where the complaint pleads facts that affirmatively establish that the plaintiff has no legal claim. *See, e.g., Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997); *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986) (Posner, C.J.) ("A plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded.").

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. *See North Star*, 720 F.2d at 580. However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *See Western Mining Council v. Watt*,643 F.2d 618, 624 (9th Cir. 1981); *see also In re Verifone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993).

III. DISCUSSION

Defendants move to dismiss Plaintiffs' action on three grounds. First, Defendants assert that IGRA and the Village/State of California Compact do not provide Plaintiffs with a private right of action. Second, Defendants content that IGRA preempts Plaintiffs' claims. Finally, Defendants argue this action must be dismissed under Rule 19(b) of the Federal Rules of Civil Procedure for lack of an indispensable party, the Jamul Indian Village. The Court will discuss each of Defendants' arguments in turn.

A. THERE IS NO PRIVATE RIGHT OF ACTION UNDER IGRA AND THE TRIBAL-STATE COMPACT

As an initial matter, Defendants contend IGRA and the Compact do not provide Plaintiffs with a private right of action such that claims arising thereunder are barred as a matter of law. (*See Defs.' Reply* at 3-4.) The Court agrees.

1. INDIAN GAMING REGULATORY ACT.

In 1988, Congress passed IGRA to: (1) statutorily regulate Indian gaming; (2) create federal standards for gaming on Indian land; and (3) establish an independent federal regulatory authority thereon. *See* 25 U.S.C. §2702. IGRA also established the National Indian Gaming Commission ("NIGC") to oversee regulation, licensing and other facets of Indian gaming. *See generally* 25 U.S.C. § 2704-20. The NIGC can approve or disapprove license applications, management contracts and tribal gaming ordinances. *See Id.* Additionally, the NIGC has a broad grant of regulatory authority. *See Id.*

The Supreme Court had held that in the face of such a comprehensive regulatory scheme, courts should not imply private rights of action. *See National R.R. Passenger Corp. v. National Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974). "[W]hen legislation expressly provides a particular remedy or remedies, court should not expand the coverage of the statute to subsume other remedies." *Id.*; *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("[W]hen Congress wished to provide a private . . . remedy, it knew how to do so and did so expressly.).

Indeed, IGRA has explicitly provided for limited and narrow private rights of action. *See Hein v. Capitan Grande Band of Diegueno Mission*, 201 F.3d 1256, 1260

(9th Cir. 2000) (holding that IGRA provides no general private right of action). For example, IGRA specifically permits Indian tribes to file suits seeking to compel NIGC management contract approval. *See* 25 U.S.C. § 2711(d). In addition, § 2714 extensively provides that "[d]ecisions made by the Commission pursuant to sections 2710 ["Tribal gaming ordinances"], 2711 ["Management contracts'], 2712 ["Review of existing ordinances and contracts"], and 2713 ["Civil penalties"] of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court." 25 U.S.C. § 2714.

In this case, Plaintiffs bring suit under various theories arising under state and federal law. However, Plaintiffs candidly admit that their claims arise from "Defendants' violation of IGRA and the Jamul Tribal-State Compact." (*Pls.' Opp'n* at 4 n.1.) Plaintiffs argue throughout their FAC that Defendants are "continuously violating . . . the Indian gaming Regulatory Act."[3] (*FAC* at ¶ 40-43, 53-56.) In *Hein*, the Ninth Circuit faced very similar circumstances. In dismissing claims related to IGRA, the Ninth Circuit stated:

> [W]here IGRA creates a private cause of action, it does so explicitly. For example, it specifically provides for suit by an Indian tribe to compel action by the Commission to approve or disapprove management contracts, 25 U.S.C. § 2711(d), and also explicitly allows for tribes to sue states under some circumstances. 25 U.S.C. § 2710(d). The existence of such explicit provisions authorizing

[3] Plaintiffs also incorporate these allegations into their state and federal claims. (*See FAC* at ¶ 49, 62, 72, 80, 88, 95, 103.)

> suits persuaded the Eleventh Circuit that plaintiffs could not sue for every violation of IGRA by direct action under the statute. *Tamiami Partner v. Miccosukee Tribe of Indians of Florida*, 63 F.2d 1030, 1049 (11th Cir. 1995). We agree with the Eleventh Circuit's conclusion.

Hein, 201 F.2d at 1260.

Based upon IGRA's enumerated rights of action and the Ninth Circuit's reasoning in *Hein*, this Court concludes that IGRA provides no private cause of action for violation of its general provisions[4]. *See Hein* 201 F.2d at 1260. Plaintiffs cannot make an end run around IGRA's provisions by disguising their claims as violations of state and federal law. If federal courts were permitted to adjudicate any alleged IGRA violation, courts would improperly infringe upon NIGC authority – the entity Congress expressly authorized to enforce IGRA's terms. *See* 25 U.S.C. § 2701 et seq. Accordingly, this Court declines Plaintiffs' invitation to read into IGRA the private rights of action Plaintiffs assert in their FAC. The Court dismisses Plaintiffs' claims to the extent they rely on IGRA. Plaintiffs' claims, as alleged, do not fall under IGRA's private right of action provisions.

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[4] Furthermore, the Supreme Court observed that, "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co.*, 442 U.S. 560, 568 (citation omitted).

2. TRIBAL-STATE COMPACT

To the extent Plaintiffs' claims are based on the Compact, these claims are likewise dismissed because the Compact does not create a private right of action for alleged violations thereof.

IGRA requires all Native American tribes pursuing Class III casino gaming to execute a Tribal-State compact ("Compact") with the state in which the tribal lands are located. *See* 25 U.S.C. § 2710(d)(3)(A). The Secretary of the Department of the Interior must approve the Compact. *See* 25 U.S.C. § 2710(d)(3)(B). On October 8, 1999 the Village negotiated a Tribal-State compact with the State of California. On May 5, 2000 the Secretary of the Department of the Interior approved the Compact.

Among the Compact's many provisions, Section 15.1 provides "[e]xcept to the extent expressly provided under this Gaming Compact, this Gaming Compact is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms." (*Pls.' Notice of Lodgement and Req. for Judicial Notice*, Ex. A at 37.) The aforementioned language is clear on its face. Any private right of action brought under the Compact must be authorized by the Compact itself.

In this case, Plaintiffs allege Defendants violated a variety of state and federal law by breaching various provisions of the Compact. (*See* FAC at ¶ 40-43, 49, 53-56, 62, 72, 80, 88, 95, 103.) However, Plaintiffs do not identify nor does the Court find any express Compact provisions

which allow Plaintiffs to privately sue Defendants to enforce the Compact's terms[5]. Accordingly, the Court dismisses Plaintiffs' claims to the extent they rely on purported violations of the Compact.

B. PREEMPTION OF PLAINTIFFS' STATE LAW CLAIMS

Even assuming Plaintiffs could pursue a private right of action, Defendants contend IGRA preempts Plaintiffs' state law claims. *See Defs.' Mem. of P. & A.* at 11-13.) Plaintiffs counter that "IGRA explicitly does not create an exclusive federal scheme for the regulation of Indian gaming." (*Pls.' Opp'n* at 17.)

1. IGRA'S FEDERAL PREEMPTION OF STATE LAW

Generally, preemption applies in Indian law where the application of state law "interferes or is incompatible with federal or tribal interests as reflected in federal law." *See Confederated Tribes of Siletz Indians of Oregon v. State of Oregon*, 143 F.3d 481, 487 (9th Cir. 1998) (quoting *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). "No specific congressional intent to preempt state activity is required; it is enough that the state law conflicts with the purpose or operation of a federal

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[5] The Court agrees with Defendants' assertion that Plaintiffs' reliance on the Compact is "odd[] at best." (*See Defs.' Reply* at 4 n.2.) Plaintiffs take the position that the Compact is not final because of a pending tribal leadership dispute. (*See Pls.' Opp'n* at 6-7.) Ironically, Plaintiffs simultaneously argue that the disputed conduct in this case violates the same Compact. (*See Id.*) Plaintiffs cannot have it both ways. If the Compact is not final, it has no legal effect, and by extension, no impact on this case.

statute, regulation, or policy." *Cabazon*, 37 F.3d at 433 (citation and internal quotations omitted).

Congress enacted IGRA to provide statutory oversight and regulation of Indian gaming. *See* 25 U.S.C. § 2702(1-2) (emphasis supplied). Congress passed IGRA in order to: (1) establish an independent federal regulatory authority to oversee Indian gaming; (2) create federal standards for regulations thereon; and (3) form the NIGC to protect gaming as a tribal revenue source. *See* 25 U.S.C. § 2702(3). "The legislative history makes clear the purpose and effect of the statute: to protect the Indian gaming industry from corruption and to provide for extensive federal oversight of all but the most rudimentary forms of Indian gaming." *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir. 1995) (footnote omitted). As further evidence of this purpose, the Senate Report submitted with the statute at the time of its passage unequivocally states that IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands." *Id.* (citing S.Rep. No. 446, 100th Cong., 2d Sess. 15-16 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076).

Despite clear Congressional intent that federal law occupy the field of Indian gaming, Plaintiffs herein seek to assert several claims arising under state law. All of these claims relate to Defendants' negotiation of a casino management contract with the Village. Specifically, Plaintiffs allege that Defendants have been: (1) knowingly and willfully providing materially false statements or information to Village members; (2) unduly interfering and influencing Class III gaming tribal government decisions; (3) significantly and unduly influencing the adoption of a Class III gaming ordinances, through persons whose prior activities and associations threaten the public interest;

and (4) unlawfully contributing money and other valuable consideration to Village members and non-members to influence their vote in favor of a Jamul Class III gaming ordinance. (*See FAC* at 10-11.)

The Court finds that all of Plaintiffs' state law claims are preempted by IGRA. Recognition of Plaintiffs' state law claims would wrongfully interfere with Congressional intent to statutorily regulate Indian gaming. *See* 25 U.S.C. § 2702(1-2). Ironically, Plaintiffs' "state law" allegations directly quote Congressional findings codified at 25 U.S.C. § 2711(e)[6]. However, § 2711(e) exclusive assigned the NIGC Chairman, not Plaintiffs, the authority to oversee Indian casino management contract disputes. *See* 25 U.S.C. § 2711(e).

Congressional desire to establish a uniform body of federal Indian gaming law is well founded. Hundreds of tribes are organized and reside in the United States. Obviously, state law varies from jurisdiction to jurisdiction. Rather than apply an unpredictable patchwork of state law to various Indian casino management contracts, Congress implemented IGRA to establish a uniform federal body of Indian gaming law. This Court will not

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[6] Section 2711(e) provides that the Chairman of the NIGC *shall not approve* a management contract if the Chairman determines that: (1) any person "has knowingly and willfully provided materially important false statements or information . . . to the Indian tribe;" (2) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associates pose a threat to the public interest . . . thereto; and (3) "the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relation to the gaming activity." 25 U.S.C. § 2711(e)(1)(C)-(D), (e)(2) (emphasis supplied).

usurp powers expressly bestowed upon the NIGC Chairman by Congress. Accordingly, Plaintiffs' state law claims are preempted since they conflict with IGRA's express purpose, regulation, oversight and implementation[7]. *See Cabazon Band*, 37 F.3d at 433 (holding that state law is preempted if it conflicts with the purpose or operation of a federal statute, regulation, or policy).

2. THE COMPACT DOES NOT REQUIRE THE APPLICATION OF CALIFORNIA LAW TO PLAINTIFFS' CLAIMS

Plaintiffs further argue the Compact requires application of California law to their claims for tortious interference, fraud, and negligent misrepresentation[8]. (*See Pls.' Opp'n* at 17-18.) The Court disagrees.

"[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not uni[l]aterally impose or allow State jurisdiction on Indian lands for the regulation of Indian

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[7] Additionally, it is well-settled that management contracts between Native American tribes and casino management companies are vital to Indian gaming. Indeed, it would be difficult for Indian tribes and casino management companies to enter into management contracts if any individual tribal member could bring suit in federal court to challenge the contract based on one party's negotiation tactics. Without these contracts, gaming operations would never exist on tribal lands, thus impeding Congressional intent of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

[8] Once again, Plaintiffs rely on the Tribal-State compact when they contend the same Compact is not final because of a pending tribal leadership dispute.

gaming activities." S.Rep. No. 466, 100th Cong., 2d Sess. 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075. "Congress ... left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact." *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) ("Under IGRA, state law may not be applied to regulate the tribal licensing process, even if indirectly, unless a tribal-state compact so provides.").

Here, Plaintiffs admit state law will apply where "specified in the [C]ompact." (*Pls.' Opp'n* at 17.) Plaintiffs further argue the Compact provides for "the application of California's civil remedies for tortious interference, fraud, and negligent misrepresentation." (*Id.*) However, Plaintiffs fail to identify any language contained in the Compact which supports such a position. This Court has likewise reviewed the Compact and cannot locate any contract language supporting Plaintiff's sweeping interpretation. While Plaintiffs do generally cite eighteen Compact provisions – none impose civil remedies upon the parties' gaming contract negotiations. Accordingly, the Court concludes that the California law upon which Plaintiffs' rely is not implicated or otherwise supported by the Compact's language. The Court **DISMISSES** Plaintiff's state law claims with prejudice and without leave to amend.[9]

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[9] That is not to say, however, that Plaintiffs are completely barred from raising claims under California law. For example, if Plaintiffs can properly allege claims that rely on California law specifically enumerated

(Continued on following page)

C. PLAINTIFFS' FEDERAL CIVIL RIGHTS CLAIMS

Plaintiffs' only remaining claims are those brought under 42 U.S.C. §§ 1981, 1982 and 1985. Each of these claims exclusively rely on the factual allegations which supported Plaintiffs' now dismissed state law claims. Because those claims have been dismissed, the Court is ill-equipped to properly examine the merits of Plaintiff's remaining federal claims. Accordingly, the Court **DISMISSES** Plaintiffs' federal claims without prejudice and with leave to amend.

If Plaintiffs elect to file a Second Amended Complaint alleging civil rights violations under §§ 1981, 1982 and 1985, Plaintiffs must plead *specific facts* regarding each Defendants' discriminatory conduct as to each individual Plaintiff. Because Plaintiffs' proposed civil rights claims all independently arise from rights secured by the Constitution, Plaintiffs may not rely on or otherwise refer to IGRA or the Tribal-State Compact to establish the prima facie elements of their proposed civil rights claims.

The Court need not reach the parties' remaining arguments insofar as all claims have now been dismissed. To the extent Defendants contend the Jamul Indian Village is a necessary and indispensable party under Rule 19(b), the Court respectfully disagrees. This action may proceed without the Village as a named party.

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and/or identified in the Compact – such claims may be capable of relief. The Court need not reach those issue insofar as they were not presented to the Court.

IV. CONCLUSION AND ORDER

In light of the foregoing, the Court **GRANTS** Defendants' Rule 12(b)(6) motion to dismiss (Doc. Nos. 35-1) and **DENIES** Defendants' Rule 12(b)(7) motion to dismiss (Doc. No. 35-2). The Court **DISMISSES** Plaintiffs' state law claims with prejudice and without leave to amend. The Court **DISMISSES** Plaintiffs' federal claims without prejudice and with leave to amend. Plaintiffs' Second Amended Complaint must be filed and served no later than ***February 28, 2001.***

The Court additionally **DENIES** as moot, and without prejudice, non-party Bureau of Indian Affairs and National Indian Gaming Commission's motion to quash subpoenas. (Doc. No. 30-1.)

IT IS SO ORDERED.

DATE: February 1, 2001

/s/ Hon. THOMAS J. WHELAN
United States District Court
Southern District of California

CC: HON. LOUISA S. PORTER, UNITED STATES MAGISTRATE JUDGE ALL PARTIES AND COUNSEL OF RECORD